Editor's note: Reconsideration granted; decision reaffirmed -- See James Joyce (On Reconsideration), 56 IBLA 327 (July 30, 1981)

JAMES V. JOYCE

IBLA 79-292 Decided September 11, 1979

Appeal from decision of Idaho State Office, Bureau of Land Management, declaring null and void unpatented mining claims El Torro #1 through #14. IMC-2558 through IMC 2571.

Affirmed as clarified.

1. Federal Land Policy and Management Act of 1976: Assessment Work -- Mining Claims: Abandonment -- Mining Claims: Assessment Work

   Where the owner of an unpatented mining claim located prior to Oct. 21, 1976, fails to file an affidavit of assessment work or notice of intention to hold the claim on or before Dec. 31 of the calendar year following the calendar year in which he recorded the claim in the BLM office, his claim is properly deemed conclusively to have been abandoned and to be null and void.

2. Federal Land Policy and Management Act of 1976: Assessment Work -- Mining Claims: Abandonment -- Mining Claims: Assessment Work -- State Laws

   A state law which requires filing of proof of assessment work which requirement is more liberal than the recordation requirements of the Federal Land Policy and Management Act of 1976, § 314a, 43 U.S.C. § 1744 (1976), cannot override the more onerous requirements of the latter, since Article VI, Clause 2 of the Federal Constitution makes the Constitution, and laws and treaties made in conformity therewith, the supreme law of the land.

APPEARANCES: Arthur E. Granger, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This appeal 1/ is from a decision dated February 27, 1979, of the Idaho State Office, Bureau of Land Management (BLM), declaring null and void 2/ unpatented mining claims El Torro #1 through El Torro #14, inclusive, IMC-2558 through IMC-2571 for failure to file, for 1978, evidence of assessment work or a notice of intention to hold the claims as required by the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1744 (1976), and 43 CFR 3833.2.

The claims were located on September 24, 1956, and recorded with BLM on October 7, 1977.

The file contains an "Affidavit of Annual Representation" indicating that $1,400 worth of work was performed on the claims for the year ending September 1, 1977. This affidavit was recorded by the Lemhi County Recorder on August 29, 1977.

The file also contains a BLM document acknowledging receipt on October 7, 1977, of evidence of annual assessment work.

A further "Affidavit of Annual Representation" was submitted by appellant with his statement of reasons. This document is typewritten and indicates that $1,400 worth of work was performed on the claims for the year ending September 1, 1978. The recording date of this document is October 3, 1977.

In his statement of reasons, appellant gave his reasons for appealing as follows:

> Evidence of assessment work/notice of Intention to hold was filed with your office on Oct. 7, 1977 in the form of

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1/ The qualification of Arthur E. Granger to file the appeal under 43 CFR 4.3(a) and 43 CFR 1.3 is not clear. However, the appeal will be considered on its merits.

2/ The decision was captioned "Unpatented Mining Claims Rejected" and recited that the mining claims in issue "are hereby rejected." The statute, 43 U.S.C. § 1744(c) (1976), states that the failure to file such instruments timely "shall be deemed conclusively to constitute an abandonment of the mining claim . . . by the owner . . . ." 43 CFR 3833.4(a) recites that such failure "shall be deemed conclusively to constitute an abandonment of the mining claim . . . and it shall be void." While we recognize that the term "reject" is inapropos in the circumstances, its impact on the many claims was evidently fully comprehended by appellant.

document # 138162, copy of which is attached. This document, while dated Oct. 3, 1977, covers the assessment year 1977 - 1978, our work was done in Sept. 1977 and Oct. 1 and 2, 1977. Therefore the assessment work was done, with no further affidavits for annual assessment due until Sept. 1, 1979 with Lemhi County and Oct 22, 1979 with the BLM.

The applicable provisions of law are contained in section 314(a) of FLPMA, 43 U.S.C. § 1744 (1976), and reads as follows:

> Sec. 314 (a) The owner of an unpatented lode or placer mining claim located prior to the date of this Act shall, within the three-year period following the date of the approval of this Act and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection. The owner of an unpatented lode or placer mining claim located after the date of this Act shall, prior to December 31 of each year following the calendar year in which the said claim was located, file the instruments required by paragraphs (1) and (2) of this subsection:
>
> (1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual assessment work), an affidavit of assessment work performed thereon, on a detailed report provided by the Act of September 2, 1958 (72 Stat. 1701; 30 U.S.C. 28-1), relating thereto.
>
> (2) File in the office of the Bureau designated by the Secretary a copy of the official record of the instrument filed or recorded pursuant to paragraph (1) of this subsection, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground.
>
> (b) The owner of an unpatented lode or placer mining claim or mill or tunnel site located prior to the date of approval of this Act shall, within the three-year period following the date of approval of this Act, file in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim or mill or tunnel site sufficient to locate the claimed lands on the ground. The owner of an

unpatented lode or placer mining claim or mill or tunnel site located after the date of approval of this Act shall, within ninety days after the date of location of such claim, file in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim or mill or tunnel site sufficient to locate the claimed lands on the ground.

(c) The failure to file such instruments as required by subsections (a) and (b) shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner; but it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof, or if the instrument is filed for record by or on behalf of some but not all of the owners of the mining claim or mill or tunnel site. [Emphasis supplied.]

The applicable regulations provide:

§ 3833.2 Evidence of assessment work/notice of intention to hold claim.

§ 3833.2-1 When filing required.

(a) (1) The owner of an unpatented mining claim located on Federal land excluding land within units of the National Park System, on or before October 21, 1976, shall file before October 22, 1979, and prior to December 31 of each calendar year following the calendar year of recording in the proper BLM office pursuant to this subpart evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim.

(2) The owner of a mill site or tunnel site located on Federal land, excluding land within units of the National Park System, on or before October 21, 1976, shall file before October 22, 1979, and prior to December 31 of each calendar year following the calendar year of recording pursuant to this subpart, in the proper BLM office a notice of intention to hold the mill or tunnel site.

(3) The owner of an unpatented mining claim located within the boundaries of units of the National Park System must comply with the requirements of 36 CFR 9.5(d) for annual filing and copies of all those annual filings received by the National Park Service pursuant to that

regulation will be given by the National Park Service to the proper BLM office. Compliance with the requirements of that regulation will be deemed full compliance.

(b)(1) The owner of an unpatented mining claim located after October 21, 1976, shall, prior to December 31 of each year following the calendar year in which such claim was located, file in the proper BLM office evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim.

(2) The owner of a mill site or tunnel site located after October 21, 1976, shall, prior to December 31 of each year following the calendar year in which such mill or tunnel site was located, file in the proper BLM office a notice of intention to hold the mill or tunnel site.

. . . . . .

§ 3833.4 Failure to file.

(a) The failure to file such instruments as are required by §§ 3833.1 and 3833.2 within the time periods prescribed therein, shall be deemed conclusively to constitute an abandonment of the mining claim, mill site, or tunnel site and it shall be void.

(b) The fact that an instrument is filed in accordance with other laws permitting filing or recording thereof and is defective or not timely filed for record under those laws, or the fact that an instrument is filed for record under this subpart by or on behalf of some, but not all of the owners of the mining claim, mill site, or tunnel site, shall not be considered failure to file an instrument under this subpart. [Emphasis supplied.]

[1] Where a mining claimant has recorded his claims with the BLM office, the above regulation requires evidence of annual assessment work, or a notice of intention to hold to be filed in the year following the year of recording. Since appellant recorded his claims in 1977 he was required to file one or the other of the documents in 1978 and no later than December 31, 1978.

Appellant filed, and BLM acknowledged his filing for the year of recording, 1977. However, appellant filed nothing in 1978, the year following the year of recording. Both of his affidavits are dated 1977 and both were apparently filed in that year.

In essence, it seems to be appellant's position that since he assertedly was not required to file proof of assessment work "until September 1, 1979 with Lemhi County" (Idaho) there was no necessity for him to file such proof or a notice of intention to hold the claim. But the latter alternative is designed to encompass the situation, presented by this case. Appellant's reasoning would give Idaho law supremacy over FLPMA -- a Federal statute. Such a conclusion is disconsonant with the supremacy enjoyed under the Constitution by Federal law over state enactments. It is stated in Lamar M. Richardson, Jr., 42 IBLA 333, 335 (1979), as follows:

> As for appellant's contention that the decision is contrary to [State] law, we need only answer that under the Supremacy Clause of the United States Constitution, Federal law necessarily overrides conflicting State laws with respect to Federal Public lands. U.S. Const., art. VI, cl. 2; Kleppe v. New Mexico, 426 U.S. 529, 543 (1976). "A different rule would place the public domain of the United States completely at the mercy of state legislation." Camfield v. United States, 167 U.S. 518, 526 (1897); see also, Utah Power & Light Co. v. United States, 243 U.S. 389, 404-405 (1917). The Federal laws and regulations are the relevant body of law in this case.

Article VI, clause 2 of the Constitution reads as follows:

> Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

See Gibbons v. Ogden, 9 Wheat. 1 (1824); McCulloch v. Maryland, 4 Wheat. 316 (1819).

Appellant could have satisfied the requirement of filing prior to December 31, 1978, by filing with BLM a notice of intention to hold the claims. This he failed to do and the claims were properly held to be abandoned and null and void by virtue of FLPMA and the implementing regulations. Nuclear Power and Energy Co. and B-2, Inc., 41 IBLA 142 (1979); Blackburn Enterprises, 41 IBLA 115 (1979).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as clarified by footnote 1, supra.

Frederick Fishman
Administrative Judge

I concur:

Joan B. Thompson
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

Section 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), provides, inter alia:

> The owner of an unpatented lode or placer mining claim located prior to the date of this Act shall, within the three-year period following the date of the approval of this Act and prior to December 31 of each year thereafter, file the instruments required by paragraph (1) and (2) of this subsection. . . .

If I were interpreting this as an initial proposition, I would conclude that the word "thereafter" modified the phrase "within the three-year period following the date of the approval of this Act," with the effect that the filing of the proof of assessment work or notice of intention to hold would be permissible to and including December 31, 1980. The regulations, however, clearly provide that the documents must be filed prior to December 31 of each calendar year following the calendar year of recording. See 43 CFR 3833.2(a)(1).

It is my view that this Board has no authority to overrule a duly promulgated regulation absent a showing that the regulation is clearly contrary to the express language of a statute. See, e.g., Continental Oil Company, 70 I.D. 473 (1963). While my personal interpretation is different than that espoused in the regulations, I must concede that the statute is sufficiently ambiguous to support the interpretation exemplified in the regulation. Thus, I agree with the majority that the regulatory requirements are binding upon us, and accordingly concur in the denial of the subject appeal.

James L. Burski
Administrative Judge